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Supreme Court, U.S
FILED

No. 05-3202 051620 MAR 8 - 2006

OFFICE OF THE CLERK

# In The
# Supreme Court of the United States

**Paulette P. Wright**

***Petitioner,***

**v.**

**Department Of Veterans Affairs**

**Respondent**

**On Petition for a Writ of Certiorari**
**To The United States Court Of Appeals**
**For The Federal Circuit**

## Petition for Writ of Certiorari

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**May 11, 2006**

# QUESTIONS PRESENTED

I. Did the agency removed the petitioner for misconduct or was she removed because of a grievance complaint filed with the EEO for which she was not charged?

II. Was the agency in compliance with the fundamental requirement of the due process and collective bargaining agreement?

III. Would or has the agency applied the same Adverse action to other employees with similar or more serious misconducts alleged?

# PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceeding below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDINGS BELOW .....ii

TABLE OF CONTENTS ..... iii

TABLE OF OF AUTHORITIES .....iv

PETITION FOR WRIT OF CERTIORARI .....1

OPINION BELOW .....1

JURISDICTION .....1

CONSTITUTION
AND STATUTORY PROVISION INVOLVED .....1-3

STATEMENT OF THE CASE .....3

REASON FOR GRANTING THE WRIT .....4

I. The Federal Circuit erred to decide whether the agency taking such Adverse Action in this case has violated federal laws, statues, rules, procedures or regulations.....7-9

II. The Federal Circuit has not decided the important issues relevant to this case requiring, the intervention of this court to exercise its supervisory power .....8

CONCLUSION .....9

INDEX TO APPENDIX ..... App. i

APPENDIX..... App. 1

Table of Authorities

Cases Page

Procunier v. Martinez U.S. 396 (1974).....2

Gerlach v. Federal Trade Commission DC07528011020 (1981).....5

Stearn v. Dept. of Navy 280 f. 3d 1376, 1380. Fed Cir (2002).....7,8

Douglas v. Veterans Administration 5 M.S.P.R 280, 306 (1981).....7

Jones v. Dept. of Navy 67 M.S.P.R. 67. 6, 8, (1995).....8

Vashi v. Potter, Fed Cir. (2004).....8

Bond v. Dept. of Energy 82 M.S.P.R. 534, 25, (1999).....9

Russo v. United States Postal Service
284 f. 3d 1304, 1310, Fed Cir. 2002).....8

Shively v. Dept of Army M.S.P.R. 531, 532(1993).....1

Constitutional, Provisional, Statues and Regulation

28 U.S.C.

1254.....1

Title I .....1

Title VII.....1

5 U.S.C.

2301.....2,5,8

7703.....6,7,8

1221.....3

7114.....4

7703.....6,7,8

7503 .....2

2302.....3

7101-7135 .....1

## Petition For Writ Of Certiorari

Paulette P. Wright (Petitioner, PRO Se), respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit

## Opinion Below

The December 8, 2005 judgment of affirmance without opinion entered under Federal Circuit Rule 36. Entry of judgment by the U.S. Court of Appeals for the Federal Fed. Cir, N0. 05-3202

## Jurisdiction

This court has jurisdiction over the Petition for Certiorari pursuant to 28 U.S.C. 1254 (1). This is a petition for writ of certiorari to review a decision of the U.S. Court of Appeals for the Federal Circuit dated December 8, 2005. Petitioner filed a timely petition for review of The Merit System Protection Board final judgment which was by the U.S. Court of Appeals for the Federal Circuit

## Constitution and Statutory Provision Involved

This matter arises under 5 U. S.C. 2302 (b) (9) which makes it a prohibited personnel practice to retaliate against an employee or applicant "because of the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation. See *Shively v. Department of the Army*, 59 M.S.P.R. 531, 537 (1993) and the Federal Service Labor- Management Relation Statue (Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. & 7101-7135) which allows federal employees to understand their rights to organize, grieve, complain, bargain collectively, and participates through labor organization and in decisions which affects them,

with full regards for the public interest. The Civil Service Act of 1978 also outlines the rights and obligation of federal agencies, labor organization and employees. Petitioner was charged numerous times for making inappropriate statements, which is also a violation her Amendment 1 rights. Thurman Marshall wrote that, the "first Amendment serves not only the needs of the polity but also those of the human spirit-a spirit that demand self expression." *Procunier v. Martinez*, U.S.396, (1974)

In order to ensure that all employees receive fairness equality and justice for all the Merit system principles under 5 U.S.C. 2301, Cause and Procedure: specifies that employee may be suspended for fourteen days or less for such cause which will promote the efficiency of the service ,including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct, see 5 U.S.C. 7503. Also Article 17, Disciplinary and Adverse Action Sec. 1 (A) p45. Labor-Management Agreement between the Department of Veterans Affairs and the Council of Veterans Administration, Local, National, Federation of Federal Employees, which clearly noted "Management agrees that action taken against unit employees will be taken for <u>just cause</u>, consistent with applicable law be fair and equitable". "The party's agrees that the concept of progressive and discipline is designed primarily to correct and improve employee behavior, rather than to punish, will usually be followed". "A more serious penalty than the least available may be taken whenever required by law or regulation, or required to correct the attitude or conduct of the employee." Usually progressively more serious penalties will be administered before removal is initiated, unless the offense is so serious that removal is justified. Employees will not be subject to arbitrary or unreasonable acts by supervising personnel".

Merit System Principles, <u>2301</u>, Subsection (b) (2): All employees and applicants for employment should receive fair and equitable treatment in all aspect of personnel management with proper regards to their privacy and constitutional rights. (4):All

employees should maintain high standard of integrity, conduct, and concern for the public interest. (6): Employees shouldbe retained on the basis of the adequacy of their performance. Inadequate performance should be corrected and employees should be separated who cannot or will not improve their performance. (A) (B) : Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences a violation of any laws, rules or regulations.

Individuals rights of action in certain reprisal cases, 5 U.S.C. 1221(e) (1): In any case involving an alleged prohibited personal practice as described under section 2302(b) (9), the Board shall order such corrective action as the Board considers appropriate, if the employee, former employee or applicant for employment has demonstrated that a disclosure described under section 2302 (b) (9) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee or applicant. The employee may demonstrate that the disclosure was a contributing factor in the personnel action, through circumstantial evidence, such as evidence that- (A):the official taking the personnel action knew of the disclosure and (B): the personnel action occurred within a period of time , such that a reasonable person would conclude that the disclosure was a contributing factor. The Board noted that the misconducts alleged were the contributing factor to the removal and not the "Protected Activity", yet the agency has not demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure (2). The facts that their were no investigation into any of the charges, a suspension without prior notice after petitioner sought advice of union representative, the agency refusal to investigate the charges as requested in writing by the petitioner, no attempt to utilize progressive discipline, or Alternate Dispute Resolution (ADR) and the fact that petitioner had never had so many paper trail of misconducts during her almost ten years tenure until after the EEO complaint certainly indicated a prohibited personnel practice under 2302 (b) (9). The head of the agency also refused to respond to petitioner's letter prior to the removal, requested the harassments

by supervisors be stopped, s[illegible] they were attributing to emotional stress on the job. Supervising personnel and head of the agency knew of the disclosure to EEO. Petitioner became emotionally stressed by the persistent and constant accusations and contacted the "Employee Assistance Program" numerous times seeking assistance. Under the collective bargaining agreement between the Department of Veterans Affairs and NFEE, investigations into all charges, progressive discipline and ADR were all part of the agreement which the agency violated. 5 U.S.C. 7114: Representation rights and duties (a) (1), A labor organization which has been accorded exclusive recognition is the exclusive representative of the employee in the unit it represents, and is entitled to act for, and negotiate collective bargaining agreement covering ,all employees in the unit. An exclusive representative is responsible for representing the interest of all employees in the unit it represents without discrimination and without regards to labor organization membership. (5) (b): The duty of an agency and an exclusive representative to negotiate in good faith, under subsection (a) of this section shall include the obligation- (1)to approach the negotiation with a sincere resolve to reach a collective bargaining agreement;(2) to be represented at the negotiations by duly authorized representative, prepare to discuss and negotiate on any condition of employment; (3) to meet at reasonable time and convenient places as frequently as may be necessary and to avoid unnecessary delays.

The agency did not indicate what rules, laws , procedure, policy or regulation has been violated by the petitioner. Their was a genuine nexus between the retaliation and the adverse action considering the circumstances of this case and the periods in which the alleged charges were drawn by supervising personnel. AJ denied petitioner most important witnesses, a union representative and a medical doctor who petitioner requested to testify on her behalf. Aj was made aware by prior counsel (Eldrige Hawkins Esq.) why the witnesses that petitioner requested, were relevant, but he presumed the above witnesses were irrelevant to the case. Aj only approved those witnesses who he perhaps knew would testify for the agency and not the petitioner. All the witnesses who testified against petitioner

were dietitians, a locksmith and a human resource personnel. The administrative judge during the hearing constantly objected to petitioner's counsel when he asked, about policy, procedures and agency violations of federal laws and collective bargaining agreement. The reason for the suspension is still in questions.

The administrative judge rejected Petitioner's defense of harmful procedural error and retaliation even with the abundance and convincing amount of written evidence provided prior to and during the hearing. See *Gerlach v. Federal Trade Commission*, DC0752801020 (1981), upholding presiding "Board" official's determination that penalty of removal was retaliatory response to employee's filing a grievance, based on the extreme disparity, between the minor nature of the sustained charges and the penalty of removal. During the administrative hearing, AJ had severely restricted petitioner's counsel, Eldrige Hawkins from questioning regarding rules and violations which were evidential of individual's intent or men rea and disparate treatment against petitioner, because of her complaint. During the administrative hearing, AJ told petitioner's attorney that if he asked the witnesses the wrong questions the judge would disqualify, him from being petitioner's attorney. AJ also denied Mr. Hawkins application to recluse himself as judge because of the impropriety of his rulings and prejudicial cross examination by the judge that disfavored petitioner, 5 U.S.C. 2301 8 (A). The judge also stated that petitioner could find another job somewhere else other than the DVA. He also indicated petitioner should know the rule of answering her beeper. There were no rules, policy, or procedure regarding any of the alleged misconduct of which petitioner was charged. AJ was made aware that during the time the dietitians stated they beeped me, new beepers were being issued and it is still unclear what number the dietitians were calling.

## Statement of the case

Paulette P. Wright (Petitioner) had prior counsel (John Boppert) petitioned for review of the "final decision" Of the Merit

Systems Protection Board. The Board sustained the removal from employment with the Department of Of Veterans Affairs who conducts business in the state of New Jersey. In the final petition the Board has denied the petition for review of the "initial decision" of the administrative Judge (AJ). The judge upheld seven of eight charges as well as the penalty of removal. The charges are controversial and have not been supported by substantial evidence, see 5 U.S.C, 7703 (c)2000.

At the time of removal petitioner was employed for almost ten years as a clinical dietitian, GS-11. Despite her hard work, exemplify work performance reviews, perfect attendance and strong commitment to patient care and public concern, she was removed from federal service on March 19, 2004 based on a three day suspension in june 2002 and an alleged reprimand in March 2003. Petitioner was charged based on the following misconducts. MSPB " Initial decision" (1) Failure to answer beeper and phone on July 11, 2003 (2) On August 28, 2003 failed to respond several times when she was paged regarding move plan (3) October 8, 2003 failed to meet with supervisor (4) On October 15, 2003 complained loudly on ward 5D that this floor is really very disorganized. Charge (5)(6) (7) (8) concern incidents which occurred at various times on October 24, 2003. (5)Making inappropriate statement to sheeba Jacobs (Dietetic intern) (6)Petitioner shouted "Oh my god dirty politics" when she saw Henry and went into her office and closed the door (7)Locked the door of her office (petitioner's office suit) (8) Refused to meet with supervisor. Charge (5) was dismissed by AJ.

The sequence of events which contributed to the removal started in June 2002when petitioner filed a complaint with the EEO located at Lyons NJ. The complaint was dismissed by the EEO. The EEO indicated that a grievance complaint was filed before the EEO complaint. Petitioner misinterpreted the law of the grievance procedure. Although in a written statement to the agency that a grievance complaint was filed, there was no complaint filed except the complaint filed with EEO. Petitioner was addressing only the grievance complaint filed with EEO. The agency and union

representatives who are employed at the Department of Veterans Affairs knew their was no other complaint filed and provided no guidance as how to further proceed. The EEO dismissal was appealed to the EEOC in Washington DC, but the decision of the EEO was affirmed and the suspension grieved was upheld based on the above reason mentioned above.

Standard of Review: The U.S. Court of Appeals standard of review for The Merit System Protection Board is governed by statutes which set aside MSPB action finding or conclusion to ensure that it is not (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c) (2000); *Stearn v. Dep't of the Navy*, 280 F.3d 1376, 1380 Fed. Cir. (2002). Under this standard the U.S. Court of Appeals for the Federal Circuit may reverse the decision of the MSPB if it is not supported by such relevant evidence as a reasonably mind might accept as adequate to support a conclusion. In many circumstances cited above there were abuse of discretion by Aj as well as other criteria set forth in the Standard of review.

## REASON FOR GRANTING THE WRIT

I. The Federal Circuit erred to decide whether the agency taking such Adverse Action in this case has violated federal laws, statues, rules, procedures or regulations

1. The court erred in finding that the agency's selection of the penalty of removal far exceeded the bounds of resonableness. The Board reviews an agency penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. In this case the Board did not mitigate the alleged charges, *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). The Board's role is not to decide what penalty it would impose, but, rather, whether the penalty selected by the agency exceeds the maximum reasonable

penalty. See *Jones v. Department of the Navy,* 67 M.S.P.R. 6, 8 (1995). The Board mitigates a penalty only where the penalty imposed by the agency is unreasonable. The agency penalty of removal in the case Paulette P. Wright v. Department of Veterans Affairs was unreasonable and far exceeded the maximum reasonably penalty, considering the minor nature of the alleged charges. The charges could have been mitigated by Aj, but wasn't which shows prejudice towards petitioner.

2. The charges were not supported by substantial evidence 5 U.S.C. § 7703(c) (2000); *Stearn v. Dep't of the Navy*, 280 F.3d 1376, 1380 (Fed. Cir. 2002) and also *Russo v. United States Postal Serv.*, 284 F.3d 1304, 1310 (Fed. Cir. 2002). AJ favored the agency and was prejudiced during the administrative hearing towards the petitioner. 5 U.S.C. 2301:8 (A) : Employees should be protected against arbitrary action, personal favoritism or coercion for partisan, political purposes.

3. The lower court has not sanction the agency for the many violations of federal laws, rules, status or regulations. Petitioner is seeking equal justice, fairness and protection under the laws and statues which the lower court erred in providing, requiring this court supervisory power. Petitioner still has not received remedy or relief sought from the lower court. The treatment toward petitioner is unfair and unjustified.

II. The Federal Circuit has not decided the important issues relevant to this case requiring, the intervention of this court to exercise its supervisory power

4. The agency failed to show that the penalty of removal was within the bounds of reasonableness for the sustained charges, failed to demonsrate it has in effect a zero tolerance policy pertaining to the charges, *Vashi v. Potter,* Fed. Cir. (2004)

5. The agency did not consider the relevant Douglas factors and the relevant aggravating factors, i.e., the seriousness of

the petitioner's misconduct, in relation to her duties. Relevant mitigating factor was not considered, i.e., the appellant's length of service, and her work history. Finally, the notoriety of the charges in selecting the penalty was omitted, *Bond v. Department of Energy*, 82 M.S.P.R. 534, 25 (1999).

## Conclusion

For the foregoing reasons above, this court should grant the certiorari in this case to resolve the important issues of federal laws, rules, policy or regulations pertaining to this case as the lower court did not address any of the issues. This court should also decide that all appeals to the Merit System Protection Board, (Initial and Final Review), U.S. Court of Appeals for the Federal Circuit and this court was timely filed. The court should also compared the punishment of others employees with that of the petitioner based on federal laws,rules, policy and procedures

Respectfully Submitted

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Index to Appendix Material

Opinions and Orders

1. U.S. Court of Appeals for the Federal Circuit, Mandate March 2, 2006.....App. 1

2. Federal Circuit affirmed MSBP final order without opinion, December 8, 2005).....App. 2

3. Final Order of MSBP Denying "Initial Petition" for review April 27, 2005).....App.3

**United States Court of Appeals for the Federal Circuit**

05-3202

PAULETTE P. WRIGHT,

Petitioner

v.

DEPARTMENT OF VETERAN AFFAIRS

Respondent,

JUDGMENT

ON APPEAL from the Merit Systems Protection Board
IN CASE NO(S): NY0752040201-I-1
ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT
DEC 8, 2005 Jan HORBALY, Clerk

**ISSUED AS A MANDATE:** MARCH 2, 2006

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

MAR 2, 2006

JAN HORBALY CLERK

Note: Pursuant to Fed Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

05-3202

PAULETTE P. WRIGHT

Petitioner,

v.

DEPARTMENT OF VETERAN AFFAIRS

Respondent.

Decided: December 8, 2005

Before MAYER, RADER, and DYK, Circuit Judges.

RADER, Circuit Judge.

The Merit Systems Protection Board (Board) sustained the Department of Veterans Affairs (DVA) removal of Paulette Wright, a former Clinical Dietitian. Wright v. Dep't of Veterans Affairs, No. NY-0752-04-0201-I-1 (M.S.P.B. Apr 27, 2005) (Final Decision). This court affirms.

DISSCUSSION

I

The DVA removed Ms. Wright from her position on eight charges, including failure to respond to pager and the phone and failure to follow a supervisor's instruction. Ms. Wright was also accused of blatantly inappropriate and disrespectful conduct.

Following a hearing, the administrative judge rejected Ms. Wright's defenses of harmful procedure error and retaliation. The judge then sustained all but one of the charges. Wright v. Dep't of Veterans Affairs, No. NY -0752-04-0201-I-1 (M.S.P.B. July 26, 2004) (Initial Decision). The Board denied Ms. Wright petition for review for failure to meet the criteria for review set forth at 5 C.F.R. & 1201.115(d). Final Decision. This court has jurisdiction under 28 U.S.C. & 1295 (a)(9).

II

This court affirms the Board decision unless it is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law or unsupported by substantial evidence. Kewley v. Dep't of Health & Human Servs., 153 F.3d 1357, 1361 (Fed Cir. 1998).

Ms. Wright asserts the administrative judge wrongfully excluded the testimony of certain "important" witnesses. The administrative judge did approve four of the appellant witnesses, but held that Ms. Wright did not show that the additional proposed witnesses were relevant. In any case, "{a} determination to allow or exclude witness testimony is within the sound discretion of the administrative judge." Guise v Dep't of Justice, 330 F.3d 1376, 1379 (Fed Cir. 2003). Ms. Wright has not presented any new evidence here to show the relevance of the disputed witnesses. The record does not show that the administrative judge abused his discretion.

Ms. Wright also contends that substantial evidence does not support the Board's decision. The administrative judge credited the uncontradicted testimony of a number of witnesses with respect to critical events. An administrative judge credibility determinations are virtually unreviewable See Frey v. U.S. Dep't of Labor, 359 F 3d 355, 13561 (Fed. Cir. 2004). Thus, this court has no reason to

disturb the credibility determinations.

Further the Board did not err in rejecting Ms. Wright's affirmative defense of retaliation. The administrative judge found that, on balance, Ms. Wright's misconduct, not her protected EEO activity was the motivation for the agency's action. Therefore, there was no genuine nexus between the alleged retaliation and the adverse action. See Warren v. Dep't of Army, 804 F.2d 654, 656 (Fed. Cir.1986). On the record we shall not disturb the finding.

Finally the Board did not err in rejecting Ms. Wright's affirmative defense based on the applicable collective bargaining agreement. Ms. Wright argued that the agreement required further inquiry into certain charges and more levels of progressive discipline before her removal. The administrative judge found no evidence that the agreement provisions were violated, and none that any violation would have a harmful effect. The court perceives no reversible error.

For the forgoing reasons the final decision of the Board is affirmed

## United States Court Of Appeals for The Federal Circuit

Notice of Entry of
Judgment Accompanied by opinion

Opinion filed and judgment Entered:12/08/05

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above . The mandate will be issued in due course.

Information is also provided about petition for rehearing en banc. The questions and answers are those frequently asked and answered by the clerk's office. Costs are taxed against the petitioner (s) under rule 39. The party entitled to cost is provided a bill of costs form and an instruction sheet with this notice. The parties are encouraged to stipulate the cost. A bill of cost will be presumed correct in the

absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties , payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, the party pro se. Payment of cost should not be sent to this court . Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34 (g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.

JAN HORBALY
Clerk

cc: Paulette P. Wright
Thomas Fatouros

Wright v. VA, 05-3202
MSBP-NY075204021-I-1

# Notice to Pro Se Appellants And Petitioners

The court has acted on your appeal or petition for review. The relief you sought from the court was denied. The accompanied judgment disposed of your appeal. It is a judgment of affirmance without opinion entered under Federal Circuit Rule 36, which states:

Rule 36. Entry of judgment.

Judgment of affirmance without opinion , citing this rule , when it determines that any of the following circumstances exits:

(a) the judgment decision or order of the trial court appealed from is based on findings that are not clearly erroneous;

(b) the evidence is support of a jury verdict is sufficient;

(c) summary judgment, directed verdict or judgment on the pleadings is supported by the record;

(d) the decision of the administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or

(e) a judgment or decision has been entered without an error of law; and an opinion would have no precedential value.

Consequently, no opinion of the court was filed in this appeal by the panel of judges that decided the appeal. Inquiries to the court seeking further explanation of the court's decision cannot be honored as the deliberations of the panels of the court in particular appeals are not recorded.

This is a final judgment of the court. No further judical review is available as a matter of right. The Supreme Court of the United States may review the judgments of this court by granting a petition

for writ of certiorari; however, a review of writ of certiorari is not a matter of right, but of judicial discretion, granted only when there are special and important reasons therefor.

# United States Of America

Merit System Protection Board

Paulette P. Wright
Appellant

Docket Number
NY-0752-04-0201-I-1

v.

Department Of Veterans Affairs

Date: April 27, 2005

Agency

John A. Boppert, Esquire, Newark, New Jersey, for the appellant.

Sylvia Scott, Esquire, East Orange, New Jersey, for the agency.

Before

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

## Final Order

The appellant has filed a petition for review of in this case asking to us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulations that establishes this standard of review is found in title 5 of the code of Federal Regulations, section 1201.115d
(5 C.F.R.) & 1201.115).

After fully considering the fillings in this appeal, we conclude

that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulations that affects the outcome. 5 C.F.R. & 1201.115 (d).

Therefore, we Deny the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. & 1201.113

For The Board:
Washington, D.C.

Bentley M. Roberts, Jr.
Clerk of the Board